No. 76-95

In the Supreme Court of the United States

OCTOBER TERM, 1976

GUADALUPE G. HERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the government's failure to disclose to him information relevant for impeachment purposes, which he nevertheless discovered through his own independent pretrial investigation, entitles him to a new trial under *Brady* v. *Maryland*, 373 U.S. 83.

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of distributing heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to fifteen years' imprisonment to be followed by a special parole term of fifteen years. The court of appeals affirmed (Pet. App. A).

Prior to trial the government produced certain of its records to petitioner and represented that it had disclosed all evidence in its possession favorable to him on the issue

of guilt. The information that petitioner charges the government with suppressing pertained to the criminal activities of its chief witness, Paul Allen Boyles, an informer. Boyles had undertaken these activities on his own for the claimed purpose of gaining the confidence of individuals in the narcotics business against whom he hoped to develop cases (Tr. 274). Boyles disclosed these activities, after the fact, to the Drug Enforcement Administration case agent (Tr. 104, 124, 151, 270, 271). The latter, while warning Boyles that he could get in trouble and risked prosecution if he continued such activities (Tr. 125, 270, 275), did not bring them to the attention of the prosecutor (Tr. 318).

On the basis of leads from records that the prosecution did disclose, petitioner undertook his own independent investigation and discovered Boyles's criminal activities, which he brought out fully on cross-examination of Boyles (Tr. 103-112, 114-129, 136-138, 151-152). At trial, the district court refused to impose sanctions against the government for withholding information, finding that the petitioner had not been prejudiced and that he had been able to put before the jury "very clearly and very dramatically and very forcefully * * * that Mr. Boyles was involved in the sale of marijuana to various and sundry persons during the time that he was working for the Agency" (Tr. 313-314).

Petitioner concedes that the information allegedly useful in impeaching Boyles was available to him, and used by him, at the trial. Petitioner's only contention here is that the information should have been disclosed prior to trial, and that failure to make such disclosures somehow affected his ability to prepare for trial. Petitioner does not indicate how his pretrial preparation was or might have been affected by the government's non-disclosure.

In *United States* v. *Agurs*, No. 75-491, decided June 24, 1976, this Court expressly rejected the contention, advanced here by petitioner, that the government's duty to disclose information should turn upon the "impact of the undisclosed evidence on the defendant's ability to prepare for trial * * * ." Slip op. 14, n. 20. As the Court said: "The rule of *Brady* v. *Maryland* [373 U.S. 83] arguably applies in three quite different situations. Each involves the discovery, *after trial*, of information which had been known to the prosecution *but unknown to the defense*" (slip op. 5; emphasis added). See also *Giles* v. *Maryland*, 386 U.S. 66, 96 (White, J., concurring); *United States* v. *Ruggiero*, 472 F. 2d 599, 604 (C.A. 2).

Where, as here, information allegedly useful in impeaching a prosecution witness is known to the defendant or brought out at the trial, any failure by the government to disclose such information, even if erroneous, is, as the court of appeals held, clearly harmless.[1] See *United States* v. *Acosta*, 526 F. 2d 670 (C.A. 5); *United States* v. *McMillan*, 508 F. 2d 101, 106 (C.A. 8); *United States* v. *Cole*, 449 F. 2d 194, 198 (C.A. 8); cf. *United States* v. *Cobb*, 271 F. Supp. 159, 163 (S.D.N.Y.).

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[1]Petitioner's suggestion that the government, prior to trial, "deliberately suppressed evidence" (Pet. 9) or "made a false and misleading response" (Pet. 7) with respect to its information on Boyles is in any event not supported by the record. As petitioner himself states, the DEA case agent represented only that "Boyles was a walk-in informant, that he had absolutely no criminal charges pending against him, that he was not 'working off a case', and that he was not under investigation of any kind" (Pet. 4). None of those representations was contradicted by the agent's subsequent testimony at trial or by any other information.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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